No. 96-954

Supreme Court, U.S.
FILED
APR 7 1997
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,
v.
PUBLIC SERVICE COMPANY OF COLORADO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly construed Section 110 of the Natural Gas Policy Act of 1978—which was repealed effective January 1, 1993—to require natural gas producers who (it is conceded) illegally collected certain amounts from consumers from 1978 through 1992 in violation of the Act to refund a portion of those amounts to consumers.

RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, respondent Public Service Company of Colorado notes that respondent Cheyenne Light, Fuel and Power Company is a wholly owned subsidiary. The following are nonwholly owned subsidiaries:

Natural Fuels Corporation
New Century Energies, Inc.
East Boulder Ditch Company
Hillcrest Ditch and Reservoir Company
United Water Company
Fisher Ditch Water Company
Baugh Lateral Ditch Company
Beeman Irrigating Ditch and Milling Company
Consolidated Extension Canal Company
Enterprise Ditch Company
Jones and Donnelly Ditch Company
Las Animas Consolidated Canal Company

Respondent Missouri Public Service Commission notes that it has no nonwholly owned subsidiaries or affiliates.

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BRIEF IN OPPOSITION

Respondents Public Service Company of Colorado, Cheyenne Light, Fuel and Power Company (collectively "PSCC"), and the Missouri Public Service Commission respectfully request that the Court deny the petition for certiorari filed by the private producers in this case.

INTRODUCTION

This Court's Rules specify that "certiorari will be granted only for compelling reasons." S. Ct. Rule 10. The decision below meets none of the criteria warranting such review. That unanimous decision—at long last bringing an end to litigation that began fourteen years ago—construes a narrow statutory provision that was enacted in 1978 and repealed in 1989, with the repeal completely

effective in 1993. There is no conflict among the circuits concerning this discrete provision, but even if there were the conflict would be of only historic interest, given the repeal. The cases on which petitioners rely in asserting the contrary construe *different* statutes involving markedly *different* regulatory regimes. The private companies seeking review assert that the decision below is important because it allegedly abridges the regulatory discretion of the Federal Energy Regulatory Commission ("FERC"), but the Solicitor General has elected not to seek review on FERC's behalf.

We doubt that the decision has the broader reach that the petitioners hypothesize; if it does, that fact should become apparent soon enough, when the court below applies the principles in this case to a statute of broader applicability that is actually still in effect. Review at this time, however, is clearly premature.

Nor is there any compelling case on the equities for disturbing the result below. As the case comes to this Court it is conceded that the producers collected the amounts in question from consumers illegally, *see* Pet. 5 n.3; all that the decision below requires is that they refund those illegally collected amounts to consumers. Indeed, the decision does not even require the producers to refund all amounts collected in violation of the Act, but allows them to retain amounts collected illegally from 1978 up to October 1983. The petition should be denied.

STATEMENT OF THE CASE

1. At issue is FERC's authority to permit natural gas producers to keep for themselves millions of dollars in reimbursements for Kansas *ad valorem* taxes, taxes which the court below held, and which the producers no longer dispute, were property taxes collected from customers from 1978 through 1992 in violation of the ceiling prices of Title I of the Natural Gas Policy Act of 1978

("NGPA"), 15 U.S.C. §§ 3311-33 (1988), *repealed*, Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 158 (1989). In 1974, the Federal Power Commission—FERC's predecessor—allowed the collection of certain states' *ad valorem* taxes pursuant to a rule promulgated under a different statute—the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*—classifying *ad valorem* taxes based on production factors as severance rather than property taxes. Pet. App. 36a, 61a. Four years later, however, Congress replaced the NGA with "a substantially new regulatory regime"—the NGPA. *Id.* at 24a. The NGPA substituted statutory maximum price ceilings for the prices previously authorized under the NGA. *See* 15 U.S.C. §§ 3311-19. Section 110(a)(1) of the NGPA permitted producers to charge amounts in excess of those ceilings only to the extent they qualified as "state severance taxes" under the *new* regime, *id.* § 3320(a)(1), as defined in the NGPA itself. *See id.* § 3320(c).

2. In August 1983, an interstate pipeline petitioned the Commission to determine whether the Kansas *ad valorem* taxes were recoverable under Section 110(a)(1) of the NGPA. FERC published notice of that request in October 1983. Three years later, FERC ruled that the taxes were recoverable under Section 110(a)(1) as state severance taxes, *Sun Exploration & Prod. Co.*, 36 FERC (CCH) ¶ 61,093 (1986), but in 1988 the D.C. Circuit vacated FERC's decision. *Colorado Interstate Gas Co.* v. *FERC*, 850 F.2d 769 (D.C. Cir. 1988). On remand, the Commission ruled that the Kansas *ad valorem* taxes were in fact property taxes and thus not recoverable under Section 110(a)(1), and that prices charged by producers which included these amounts therefore exceeded the statutory price ceilings to that extent. It then ordered the producers to refund all amounts unlawfully collected after June 1988—the date of the D.C. Circuit's *Colorado Interstate* decision—permitting the producers to

retain millions of dollars collected illegally from 1978 to 1988 in violation of the NGPA. Pet. App. 49a-53a.

3. The producers thereupon challenged the Commission's decision that the taxes in question were property taxes rather than severance taxes, and argued that, in any event, the Commission's ruling "worked a change in the law that should be applied prospectively only." *Id.* 2a. PSCC, supported by the Missouri Public Service Commission as an intervenor, "challenge[d] the Commission's authority to limit the retroactivity of the producers' liability for refunds" to 1988—ten years *after* the NGPA was passed. *Id.* The court below upheld that portion of the Commission's decision determining that the tax was a property tax (which petitioners no longer dispute, *see* Pet. 5 n.3), but overturned that portion of the Commission's decision holding that the producers were only required to refund the taxes unlawfully collected since June 1988. *Id.* at 18a-24a.

4. As to the second component of its decision, the court below held that the producers were required to refund to their customers all taxes unlawfully collected after October 1983—the date on which interested parties first received notice that the recoverability of the taxes under the new statute (the NGPA) had been placed at issue and, according to the court, the earliest date that had been advocated by any party in this case. In reaching that result, the court rejected arguments "that the Congress intended to grant the agency the discretion to allow so capricious a thing" as to permit the producers "to keep some unlawful overcharges without any justification at all." *Id.* at 24a.

5. The panel unanimously denied rehearing, and the full court denied rehearing en banc, with no member requesting a vote. Pet. App. 31a-33a.

REASONS FOR DENYING THE WRIT

1. The accuracy of the central supposition underlying the producers' petition—that the court below engaged in an independent, *de novo* review rather than reviewing the agency's decision for abuse of discretion—is not apparent from the opinion itself. Certainly the court nowhere asserts that it is undertaking such an independent analysis or eschewing abuse of discretion review; the fact that "[t]he D.C. Circuit never explained why it failed to apply the deferential standard of review" (Pet. 16) may be because no such explanation was called for because there was no such failure. Indeed, the court rejected FERC's suggestion that "the Congress intended to grant the agency the discretion to allow so capricious a thing" as to permit the producers to keep the unlawful overcharges under the circumstances of this case. Pet. App. 24a. Thus, even under abuse of discretion review, it is clear that the court below found the agency's position "capricious" and beyond any discretion Congress may have conferred.

The producers are accordingly quite wrong in asserting that FERC's decision would have been affirmed under an abuse of discretion standard (Pet. 14) or that the alleged application of *de novo* review was "outcome-determinative" (Pet. 17). The petitioners contend that FERC's ruling "surely" would have been upheld under abuse of discretion review, because FERC necessarily had discretion to take into account the producers' "settled expectations" based on prior Commission rulings. *See* Pet. 9. The court below, however, ruled that any reliance by the producers on those rulings would have been "foolhardy," in light of the fact that the prior rulings were under the NGA while the NGPA was "a substantially new regulatory regime." Pet. App. 24a. Rewarding "foolhardy" reliance plainly would constitute an abuse of discretion, so the result below would be the same under abuse of discretion

or *de novo* review. Whether or not the producers' supposed reliance was foolhardy is of course a fact-bound issue not appropriate for this Court's review on certiorari.

Regardless of the standard of review, the court below simply determined that the agency lacked the authority under this particular statutory regime to permit the producers to do what the statute forbade—collect from consumers amounts in excess of the statutory ceiling prices.[1] *That* question has no broader applicability and indeed no future applicability at all, because the pertinent provisions of the statute in question were repealed effective January 1, 1993, and the regulatory regime of maximum ceiling prices has long since been replaced by a more market-oriented system. *See, e.g., District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940) (petition for certiorari "denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance").

Certainly the decision below has not had the "important repercussions" predicted by petitioners (Pet. 17). In fact, in the more than seven months since the opinion was issued, it has *never* been cited by the D.C. Circuit, or, for that matter, any other court, federal or state.

2. Contrary to the producers' contention, the decision below did not precipitate a conflict among the circuits on

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[1] Certainly the producers are wrong in their unfair assertion that the court below "ignored the Commission's analysis" (Pet. 15). It did no such thing, as a reading of the opinion amply confirms. *See* Pet. App. 5a, 18a-19a, 21a-22a. The fact that the court did not ultimately affirm FERC's analysis does not mean that it "ignored" it.

The producers' current refrain that the court below should have deferred to the Commission is of course quite sharply at odds with their own position below, where they argued that the Commission erred and should be reversed for failing to make its decision wholly prospective. *See* Brief for Producer Petitioners, at 28-34; Reply Brief for Producer Petitioners, at 14-17.

the appropriate scope of judicial review of agency remedial orders. None of the five non-FERC cases cited by petitioners for the proposition that "review of agency remedial judgments must be deferential" (Pet. 9) remotely involves the question presented here: whether an agency has the "remedial" authority to permit those subject to its regulation to violate a statutory maximum price ceiling. Instead, each involved the quite different question of an agency's authority to impose sanctions within limits expressly defined by statute for a violation of the statute. Even in those situations the cases cited by petitioners recognize that an agency cannot impose a sanction "unwarranted in law," *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186 (1973) (quotation omitted), which is precisely what the D.C. Circuit determined would be the case if the producers were permitted to keep the amounts they illegally collected in excess of the statutory ceiling prices. Pet. App. 24a.

An agency's authority to fashion remedies in any given proceeding is drawn from—and governed by—the *statute* it is implementing. *Towns of Concord, Norwood, & Wellesley* v. *FERC*, 955 F.2d 67, 76 n.8 (D.C. Cir. 1992). Congress's narrow grant of remedial authority under the NGPA distinguishes this case from the others cited in the petition and eliminates any conceivable conflict with the cases relied upon by the producers, which involved entirely different statutory regimes.

Virtually all of the cases cited by the producers involve challenges to FERC actions under different statutory regimes—such as those established by the NGA and the Federal Power Act ("FPA")—in which Congress did indeed give to the Commission broad discretion both to fashion remedies and to order refunds as it saw fit. *See, e.g., Southern Natural Gas Co.* v. *FERC*, 813 F.2d 364 (11th Cir. 1987) (NGA); *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 998 F.2d 1313 (5th Cir. 1993) (NGA); *Estate of French* v. *FERC*, 603 F.2d 1158 (5th

Cir. 1979) (NGA); *Gillring Oil Co.* v. *FERC*, 566 F.2d 1323 (5th Cir.) (NGA), *cert. denied*, 439 U.S. 823 (1978); *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (3d Cir. 1977) (NGA), *cert. denied*, 434 U.S. 1062 (1978); *Borough of Ellwood City* v. *FERC*, 583 F.2d 642 (3d Cir. 1978) (FPA), *cert. denied*, 440 U.S. 946 (1979); *Boston Edison Co.* v. *FERC*, 856 F.2d 361 (1st Cir. 1988) (FPA); *Southwestern Publ. Serv. Co.* v. *FERC*, 842 F.2d 1204 (10th Cir. 1988) (FPA).

The NGPA established an altogether different regulatory regime. Under the NGPA, Congress specified maximum price ceilings (15 U.S.C. §§ 3311-33) and outlawed the collection of prices in excess of those ceilings. 15 U.S.C. §§ 3411-19. More to the point, unlike the situation with the NGA or the FPA, Congress in the NGPA did not give to the Commission the discretion to award refunds as it saw fit. Congress gave to the Commission the more limited task of determining when collected prices exceed the statutory limits, as well as the authority to bring civil and criminal proceedings to enforce the Act. *Id.* § 3414.

This critical distinction in regulatory regimes was not lost upon the court below:

> [T]he key point [made by PSCC] is that the Commission does not have the expansive remedial powers under the NGPA that it wielded under the NGA, 15 U.S.C. § 717c(e). Specifically, whereas the NGA gave the Commission discretion to order refunds if it determined that a rate was not just and reasonable, the NGPA established maximum lawful prices and gave the customer a right to a refund if it was overcharged. [Pet. App. 22a.]

3. The producers labor to obfuscate these important differences between the NGA and the NGPA by pointing to the NGPA's general administration provisions, authorizing the Commission to take action "as it may find necessary or appropriate to carry out its functions" under the

statute, 15 U.S.C. § 3411(a). Such general housekeeping provisions do not empower FERC to defeat the specific provisions of the NGPA by permitting producers to retain amounts collected in excess of the legislatively mandated maximum price ceilings. *See Maislin Ind., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); *National Mining Ass'n* v. *United States Dept. of Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("general rulemaking provisions * * * do not * * * permit [agency] to trump Congress's specific statutory directive"); *American Petroleum Inst.* v. *EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions * * * in a particular area").[2]

Indeed, FERC itself took the position—prior to this case, at least—that the NGPA "does not permit adjustment relief from the statute." *M.H. Marr*, 16 FERC (CCH) ¶ 61,118, at 61,272 (1981). Such a result, the Commission correctly recognized back then, would "impl[y] a power on the part of the Commission to selectively rescind by the exercise of adjustment authority whole sections of the NGPA." 16 FERC at 61,272-73. "This result," the Commission found, "could not have been

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[2] For this reason, the panel decision is fully consistent with *Laclede Gas Co.* v. *FERC*, 997 F.2d 936 (D.C. Cir. 1993). In that case, the court linked FERC's discretion in ordering refunds to 15 U.S.C. § 717o (authorizing FERC to take actions that are "necessary or appropriate to carry out the provisions" of the NGA). *See* 997 F.2d at 944. As noted, the NGPA has a similar provision, 15 U.S.C. § 3411(a), but that Act's regulatory scheme and core purposes are altogether *different* from the NGA's. Whatever the case under the NGA, no fair reading of the NGPA would support the conclusion that § 3411(a) authorizes the Commission to permit producers to keep millions of dollars in unlawfully collected amounts —in direct contravention to that Act's other provisions and its core purposes.

intended by Congress in enacting the NGPA." *Id.* It was not.[5]

4. The point is perhaps driven home by comparing the producers' petition for certiorari with their previous petition for rehearing and suggestion for rehearing en banc filed with the D.C. Circuit. The theme of the rehearing petition was that the decision below conflicted with numerous recent D.C. Circuit decisions deferring to FERC's exercise of remedial authority. *See* Pet. Reh. at 2, 7, 12 (citing, *e.g.*, *Public Utilities Comm'n* v. *FERC*, 988 F.2d 154 (D.C. Cir. 1993) (NGA); *Gulf Power Co.* v. *FERC*, 983 F.2d 1095, 1096 (D.C. Cir. 1993) (FPA); *Office of Consumers' Counsel* v. *FERC*, 783 F.2d 206, 233 (D.C. Cir. 1986) (NGA); *Columbia Gas Transmission Corp.* v. *FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) (FPA and NGA); *Arizona Elec. Power Coop.* v. *FERC*, 631 F.2d 802 (D.C. Cir. 1980) (FPA); *Niagara Mohawk Power Corp.* v. *FERC*, 379 F.2d 153, 155 (D.C. Cir. 1967) (FPA)). These decisions are not mentioned in the producers' petition for certiorari, of course, because they would at least raise a serious question whether the D.C. Circuit's decision in this case represents a dramatic but unannounced departure from these precedents, or instead is readily explainable for the reason we suggest—it, unlike the other cases, involves the NGPA, and its very different regulatory regime.

It is axiomatic that an agency's authority—including its remedial discretion—is limited to that delegated to it by Congress. The decision below is faithful to that funda-

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[5] Petitioners err in suggesting that the court was required to remand the case to the agency a *third* time. Pet. 14-15 & n.9. There is no requirement that a court "convert judicial review of agency action into a ping-pong game" when a remand would be unnecessary. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-767 n.6 (1969). *Accord American Train Dispatchers Ass'n* v. *ICC*, 26 F.3d 1157, 1163 (D.C. Cir. 1994) ("A remand is unnecessary where, as here, the outcome of a new administrative proceeding is preordained").

mental precept of administrative law. At the same time, it does not, as the producers assert, present any affront to other decisions recognizing FERC's broad discretion to fashion remedies under *different* regulatory schemes than the one at issue here. There is, accordingly, no conflict among the circuits.

For these reasons, the "Question Presented" by the producers quite clearly begs the question. The producers ask "[w]hether a court of appeals may review *de novo*—rather than for abuse of discretion—an administrative agency's exercise of the remedial authority delegated to it by Congress," Pet. i, when the whole point is that, as the court below ruled, Congress did not delegate remedial authority to FERC to authorize "producers to keep some unlawful overcharges without any justification at all." Pet. App. 24a. The producers do not even attempt to argue that *that* question—the narrow one that *is* presented in the context of a repealed statute by the decision below—warrants this Court's review. It does not.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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